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No. 97-215

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

THOMAS M. THOMPSON, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Does the Ninth Circuit have jurisdiction to recall its mandate in a capital habeas case which is already final, when that action results in the relitigation of the same claims on the same facts in contravention of 28 U.S.C. § 2244(b)(1)?

2. Did the Ninth Circuit clearly abuse its discretion in granting a recall of the mandate because of a possible miscarriage of justice predicated on the ground that two of its judges mistakenly believed they did not have the ability to request en banc rehearing following the panel's modification of its decision?

3. Did the Ninth Circuit, sitting en banc, err in concluding that the three-judge panel "committed fundamental errors of law that would result in manifest injustice" sufficient to justify recalling the mandate?

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THOMAS THOMPSON, *Respondent*.

OPINION OR JUDGMENT BELOW

Thomas M. Thompson v. Arthur Calderon, ___F.3d ___(9th Cir. 1997) published order of the Ninth Circuit Court of Appeals on August 3, 1997, recalling the mandate, vacating its decision, affirming partial grant of habeas relief, reversing partial denial of habeas relief, remanding to district court for further proceedings, and ordering State to vacate execution order. (J.A. 211-76.) Other relevant orders are set forth in the Joint Appendix.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals recalling the mandate in Thomas Thompson's first federal habeas case, vacating the decision of the Ninth Circuit in the case, and affirming the partial grant of habeas relief and reversing the partial denial of habeas relief by the district court, was entered on August 3, 1997. The Petition for Writ of Mandamus filed by Warden Calderon, which was subsequently deemed a Petition for Writ of Certiorari, was

filed on August 3, 1997. The jurisdiction of this Court over this matter is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES, REGULATIONS

Section 2244(b) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (b)(2) A claim presented in a second or successive habeas application that was not presented in a prior application shall be dismissed unless -
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (B)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

> (3)(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (3)(C) The court of appeals may authorize the filing of a second or successive application only if it determined that the application makes a prima facie showing that the applicant satisfies the requirements of this subsection.
>
> (3)(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (3)(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or a writ of certiorari.
>
> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claims satisfies the requirements of this section.

STATEMENT OF THE CASE

In 1983, following a trial by jury, Thomas Thompson was convicted of raping and personally murdering Ginger Fleischli, and sentenced to death. Following an automatic appeal, the California Supreme Court affirmed the judgment of conviction and sentence of death. *People v. Thompson*, 45 Cal. 3d 86, 246 Cal. Rptr. 245, 753 P.2d 37 (1988), *cert. denied*, *Thompson v. California*, 488 U.S. 960 (1988).

On January 16, 1990, Thompson filed a Petition for Writ of Habeas Corpus with the United States District Court

for the Central District of California. On March 29, 1995, the district court entered an order denying Thompson's Petition for Writ of Habeas Corpus as to his conviction for first degree murder and granting the petition as to Thompson's conviction for rape and the rape special circumstance finding, thereby vacating the sentence of death.

Both parties appealed to the Court of Appeals for the Ninth Circuit. On June 19, 1996, a three-judge panel of the Ninth Circuit issued a unanimous decision reversing the district court's partial grant of habeas relief and affirming the district court's partial denial of habeas relief, after concluding the district court's grant of habeas relief based on ineffective assistance of counsel was erroneous in light of Thompson's failure to show prejudice. *Thompson v. Calderon*, 86 F.3d 1509 (9th Cir. 1996).

Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. On March 6, 1997, the Opinion filed on June 19, 1996, was amended without altering the judgment and, except for the amendments, Thompson's Petition for Rehearing was denied. The three-judge panel recommended the rejection of the Suggestion for Rehearing En Banc. After being advised of the Suggestion for Rehearing En Banc, no judge in active service in the Ninth Circuit requested a vote to rehear the matter en banc. *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir. 1996).

On April 21, 1997, Thompson filed a Petition for Writ of Certiorari in this Court. On June 2, 1997, this Court denied the petition (*Thompson v. Calderon*, ___ U.S. ___, 117 S. Ct. 2426 (1997)), and the Ninth Circuit issued its mandate on June 11, 1997.

On June 20, 1997, the Orange County Superior Court ordered that Thompson be put to death at the California State Prison at San Quentin on August 5, 1997.

On July 16, 1997, the California Supreme Court denied Thompson's fourth Petition for Writ of Habeas Corpus, rejecting his claims of: (1) newly discovered evidence of

actual innocence; (2) suppression of evidence of his innocence by the prosecution for 15 years; and (3) misconduct by a juror during voir dire which deprived him of a fair trial. *In re Thompson*, Case No. S062592

On July 23, 1997, Thompson filed a motion pursuant to Fed. R. Civ. P. 60(b) in the district court for relief from judgment entered in his first federal habeas proceeding. On July 25, 1997, the district court, issued an Order denying the motion based on lack of jurisdiction, and alternatively, on the grounds that: (1) Thompson's claims were subject to dismissal pursuant to Habeas Rule 9 due to abuse of the writ; and (2) his execution would not be a miscarriage of justice.[1] On July 28, 1997, Thompson filed a Notice of Appeal, and the district court issued a Certificate of Probable Cause.

On July 23, 1997, Thompson filed a Motion to Recall the Mandate in the Ninth Circuit. A three-judge panel denied the motion on July 28, 1997, without prejudice to any other proceedings. On July 30, 1997, Thompson filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was granted the same day.

On July 31, 1997, the Governor of California issued a written decision denying Thompson's Request for Clemency, expressly rejecting Thompson's claim of innocence.

The Ninth Circuit, sitting en banc, heard oral argument on Friday August 1, 1997, on Thompson's Motion to Recall the Mandate.[2] On Sunday, August 3, 1997, the Ninth Circuit issued an opinion recalling the mandate in

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1. Richard A. Gadbois, Jr. the district court judge originally assigned to Thompson's case died while the appeals filed by both the State and Thompson were pending before the Ninth Circuit. Accordingly, district court Judge Dickran Tevrizian was assigned to the case in July of 1997.

2. The en banc court for this case consisted of the Chief Judge of the Ninth Circuit and 10 additional judges, as opposed to the full court. *See* Cir. R. 35-3 [Limited En Banc Court].

Thompson's federal habeas case, vacating the unanimous three-judge panel opinion in the case, affirming the district judge's partial grant of habeas corpus relief as to Thompson's rape conviction and rape special circumstance, and vacating the death sentence; remanding the case to the district court for further proceedings regarding Thompson's request for habeas relief on his conviction of first degree murder; and ordering the State to vacate its execution order.

On August 3, 1997, the Warden of the California State Prison at San Quentin filed a Petition for Writ of Mandamus. On August 4, 1997, this Court deemed the filing a Petition for Writ of Certiorari and granted the writ as to questions one and two. On August 26, 1997, this Court amended the grant of certiorari to include a third question.

STATEMENT OF FACTS

Thompson raped and brutally murdered 20-year-old Ginger Fleischli in the early morning hours of September 12, 1981, inside a small one room apartment he shared with his crime partner, David Leitch.

Background

David Leitch moved into the Laguna Beach apartment where Fleishli was murdered around the time of his divorce in May or June of 1981, and Fleischli joined him about a week later.[3/] Fleischli moved out of the apartment toward the end of August, and moved into the Newport Beach home of her longtime friend, Tracy Leitch. Tracy Leitch was David Leitch's ex-wife. After Fleischli moved out of the apartment, Thompson moved in with David Leitch.

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3. Fleischli had been sexually involved with Leitch prior to his marriage in 1978 and resumed sexual relations with him when she moved into the apartment in 1981.

David Leitch had met Thompson only recently, and Fleischli first met Thompson through David Leitch a few weeks before her murder. Thompson was using an alias, "Thomas Young," at the time.

On the evening of September 11, 1981, Fleischli and Tracy Leitch met at a pizza parlor on Balboa Island in Newport Beach, where they encountered Thompson and David Leitch. At the pizza parlor, Fleischli expressed fear to Tracy Leitch that she would be killed if she went with Thompson. The foursome then got into David Leitch's car and went to the Sandpiper Inn in Laguna Beach. Fleischli and Thompson remained at the Sandpiper drinking, while David and Tracy Leitch left.

Later that evening, at approximately 9:30 p.m., Afshin Kashani saw Thompson with Fleischli at the Sandpiper. Kashani had known Fleischli and Thompson for approximately one week. Kashani and Thompson left Fleischli at the Sandpiper for approximately 10 minutes while they went and smoked hashish. Between 11 and 11:30 p.m., Fleischli, Kashani and Thompson went to a nearby bar where they drank and danced. Sometime around one o'clock in the morning, Thompson, Kashani, and Fleischli walked to Thompson's apartment. Thompson and Kashani smoked more hashish.

Approximately 2 a.m., within a few minutes of arriving at the apartment, Fleischli left to get a soda at a nearby liquor store, indicating she would be back. Thompson told Kashani he wanted to spend the night alone with Fleischli as Thompson would be leaving for Southeast Asia the next week, so Kashani left approximately five to ten minutes after Fleischli.

As Kashani walked to his truck, which was parked at the Sandpiper, he realized he had forgotten his cigarettes. Kashani returned to Thompson's apartment. Thompson did not invite Kashani inside. Instead, Thompson appeared nervous and gave Kashani the cigarettes through the door. Kashani then walked back to his truck and went to look for

Fleischli to tell her he was leaving. He drove to the nearest liquor store and went inside and did not see her. He drove down the coast highway and left when he did not see her.

About 8:30 a.m., on September 12th, Tracy Leitch and her young daughter arrived at Thompson's apartment. She asked Thompson where Fleischli was. Thompson lied and told her that Fleischli had left the night before with Kashani from the Sandpiper. Tracy Leitch noticed that the carpet in the apartment was damp, after she knelt down on the carpet and got a damp stain on her slacks. Later in the day, she again asked Thompson about Fleischli. Thompson told her a second time that Fleischli had left with Kashani. Thompson referred to Fleischli in the past tense that evening stating, "I really liked Ginger. She was a nice girl."

The Investigation

On September 14, 1981, Fleischli's body was found in a nursery tree grove near a freeway in Irvine. Two shoeprints were found near Fleischli's body. One was made by a wavy soled shoe in the same size and pattern as a pair of shoes David Leitch had been wearing during September. A smooth shoeprint could not be identified.

Fleischli's body was wrapped in a pink blanket and in a "Benji" sleeping bag from Thompson's apartment. Fibers from the blanket matched fibers found in the trunk of David Leitch's car and fibers found on the body matched the carpet from Thompson's apartment. A red smear on the rope wrapped around Fleischli's body also matched the paint from the trunk of David Leitch's car.

Fleischli's head was wrapped with silver duct tape, two towels, a sheet and her jacket. Her top and bra had been cut from top to bottom into two pieces, and had been pulled backwards so only the arms were in clothing. Fleischli's upper chest area was completely exposed. Her Levis were fully zipped, but unbuttoned. She was not wearing shoes,

underwear or socks. A vaginal swab revealed the presence of semen consistent with Thompson's blood type.

An autopsy revealed five stab wounds in the area of the right ear, all caused by a single-edged knife. One wound extended through the ear and two and one-half inches into the neck region, cutting the carotid artery and causing death. Testing revealed the presence of Fleischli's blood in the carpet, carpet padding and on the cement floor of the apartment.

Flesichli's ankles, hands, wrists, and left elbow showed bruising, which had occurred within 15 minutes to 3 hours prior to death and appeared to have resulted largely from the handling of the body. One bruise to a wrist was consistent with use of handcuffs.

Thompson's Statements To Law Enforcement

On September 26, 1981, Thompson was arrested in Cabo San Lucas, Mexico. He had handcuffs in his possession when arrested. In his statements to Orange County sheriff's investigators he first indicated Fleischli came to his apartment, went to the liquor store, but never returned to the apartment on the night of the murder. Thompson said that after Kashani left that night he fell asleep.

Thompson also told investigators that the next morning when Tracy Leitch was at the house and asked him what he did with Fleischli, he told her that Fleischli never returned to the apartment. Thompson also said he told Tracy Leitch that Fleischli had left with Kashani. Thompson admitted that when Tracy Leitch asked him what he had done with Fleischli, he started thinking of "self-preservation."

Thompson told investigators that Fleischli died of stab wounds to the head. However, the Orange County Sheriff's Department had not released that information to the public.

Thompson's Statements To Jail Inmates

Thompson admitted to two jail inmates that he raped and murdered Ginger Fleischli. At one point he expressed concern about his crime partner giving information against him. On another occasion he stated he took care of her "in a quiet way" as if he was "in the jungle," then wrapped her in a sleeping bag and had David Leitch help him dispose of the body. Thompson also asked a jail inmate to find a witness who could implicate David Leitch in the murder, by making it look like Leitch was trying to implicate Thompson as the murderer. Thompson subsequently said he wanted David Leitch, who was at one point out of custody on bail pending trial, killed so authorities would then think he fled the country because he was guilty.

Defense

Ignoring the advice of his counsel, Thompson took the stand and testified on his own behalf. His defense was that he had consensual intercourse with Fleischli after she returned from the liquor store and then fell asleep while she was dressing. He testified he woke up later that morning, Fleischli was gone, and there were no signs of foul play.

Thompson was questioned about his lie to Tracy Leitch that he last saw Fleischli leaving the bar with Kashani. Thompson was also asked why he lied to police about Fleischli returning to his apartment after she went to the liquor store. He was also asked why he lied to police in denying that he had sexual intercourse with Fleischli in the early morning hours before she was stabbed to death. Thompson admitted to purchasing a pair of handcuffs shortly before Fleischli's murder, despite being low on funds, and having those handcuffs in his apartment the night she died. Thompson was also asked how he could have slept through Fleischli being bound, gagged and stabbed to death about six feet from where he slept inside the small studio apartment.

SUMMARY OF ARGUMENT

Less than two weeks before his scheduled execution, Thomas Thompson simultaneously filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b) in the district court and a Motion to Recall the Mandate in the Ninth Circuit based on a claim of newly discovered evidence which had already been denied on the merits by the California Supreme Court. The district court denied the Rule 60(b) motion and the same three-judge panel of the Ninth Circuit that decided Thompson's first habeas petition denied his Motion to Recall the Mandate. After Thompson filed a Petition for Rehearing and Suggestion for Rehearing En Banc of the denial of his Motion to Recall the Mandate, the Ninth Circuit voted to consider en banc "whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice."

The en banc majority of the Ninth Circuit issued a decision less than 36 hours before Thompson's scheduled execution recalling its mandate, vacating its previous decision in the case, affirming the district court's partial grant of habeas relief as to Thompson's rape conviction and the rape special circumstance (thereby removing the finding which rendered Thompson death eligible under California law), reversing the partial denial of habeas relief as to Thompson's first degree murder conviction, remanding to the district court for further proceedings regarding the murder conviction, and ordering the State to vacate its execution order. The en banc majority cited two "extraordinary circumstances" for its act of recalling the mandate. First, it relied upon the failure of two judges to make a timely call for a vote for en banc rehearing in the case. Second, it asserted that the panel decision in the case "appear[ed]" to have made "fundamental errors of law" which would result in a "manifest injustice" if not corrected by the en banc majority.

In recalling the mandate, the en banc majority acted in excess of its jurisdiction over habeas corpus proceedings involving state inmates. Since Thompson's first federal habeas petition had been denied on the merits, and that decision was a final judgment, the Ninth Circuit was compelled to enforce the provisions of AEDPA, regarding second or successive petitions for habeas corpus relief.

Compliance with AEDPA mandated that the Ninth Circuit deem Thompson's Motion to Recall the Mandate to be a request for permission to file a second or successive habeas petition in the district court. Thompson's claim of newly discovered evidence could not be heard in the district court until a three-judge panel of the Ninth Circuit concluded Thompson had made a prima facie showing of meeting the stringent requirements of AEDPA for the filing of a second or successive habeas petition in the district court. In this case, even if Thompson had obtained the permission of the three-judge panel allowing him to return to the district court and present his claims in a second or successive petition, it is clear he would have then been precluded from being heard in the district court. In ruling on Thompson's Rule 60(b) motion, which contained identical claims to those in the Motion to Recall the Mandate, the district court concluded that Thompson could not meet the less stringent pre-AEDPA standards for being heard in a second or successive federal habeas petition.

Although an appeal from the denial of Thompson's Rule 60(b) motion was fully briefed and pending before the Ninth Circuit, the en banc majority declined to consider the matter, despite the fact the motion was predicated on the identical claim presented in Thompson's Motion to Recall the Mandate. Instead, the en banc majority concluded the pending appeal was moot in light of its decision to recall the mandate in Thompson's case. The en banc majority emphasized that its action in recalling the mandate was sua sponte and not in response to any new argument, ground for

relief, or claim of newly discovered evidence in Thompson's Motion to Recall the Mandate.

Even if the en banc majority acted sua sponte, without regard to Thompson's grounds for relief in his Motion to Recall the Mandate, it does not ameliorate the "end run" on AEDPA in Thompson's case. AEDPA has entrusted the role of "gatekeeper" to the federal circuit courts in order to ensure that no state inmate is permitted to litigate the same claims on the same facts and law in a successive petition in the district court. 28 U.S.C. § 2244(b)(1).

Further, the Ninth Circuit's actions would have constituted an impermissible circumvention of the law even prior to enactment of AEDPA. The controlling principles of law that evolved from the societal interests in finality, comity, federalism, conservation of scarce judicial resources, and deterrence of crime, precluded successive petitions and abuse of the writ absent meeting procedural requirements unique to habeas corpus litigation even prior to enactment of AEDPA. AEDPA only heightened the procedural requirements that guard against successive petitions and abuse of the writ. Accordingly, in circumventing the requirements of AEDPA, the Ninth Circuit not only violated 28 U.S.C. § 2244(b)(1), it also ignored the expansive body of law which has developed to protect the State's legitimate interest in enforcing its criminal laws against endless collateral challenges by state inmates and eleventh-hour litigation in capital cases.

The law governing habeas corpus precludes a federal court from recalling its mandate when the effect is litigating additional habeas claims by a state inmate, or relitigating a state inmate's habeas claims. Any other conclusion renders the limitations on second or successive petitions meaningless. The procedures for a state inmate being heard after a first federal habeas proceeding is final are well delineated, and exclusive remedies. The inmate can seek permission from the federal circuit court for permission to file a second or successive petition. The inmate can file a petition for writ of

habeas corpus in state court or request clemency from the governor of the state. Further, the inmate can file an original petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2241.

The equitable principles underlying a circuit's court's power to recall its mandate do not support the en banc majority's recall of the mandate in Thompson's case. Well established principles of law of the case preclude the recall of a mandate absent "exceptional circumstances." Accordingly, even separate and apart from the stringent restrictions governing habeas corpus proceedings, the en banc majority abused its discretion in revisiting a final decision since there were no such "exceptional circumstances" present in Thompson's case. A mere breakdown in the en banc process in the Ninth Circuit does not constitute an "exceptional circumstance" justifying revisiting the final judgment in Thompson's case. This is particularly true in this case, since there was nothing supporting en banc review in the first place. The application of well established law to the facts of Thompson's case by the panel afforded no legitimate basis for en banc review.

The en banc majority's second "exceptional circumstance" is also unsupported legally and factually. The panel's decision finding an absence of prejudice from Thompson's ineffective assistance of counsel allegations was not legally incorrect. Further, the panel's rejection of Thompson's claim that the prosecutor pursued inconsistent theories in the separate trial of Thompson and his crime partner was also not legally incorrect. The fact that other jurists would resolve the case differently than the panel does not constitute fundamental legal errors resulting in a manifest injustice.

The only manifest injustice is the en banc majority's actions in this case. The eleventh-hour intervention by the en banc majority in Thompson's case was inconsistent with truth and justice and should be reversed.

ARGUMENT

I.

A FEDERAL APPEALS COURT LACKS JURISDICTION TO CONSIDER HABEAS CLAIMS ALREADY RESOLVED ON THE MERITS IN A FIRST FEDERAL PETITION ABSENT COMPLIANCE WITH AEDPA

Condemned inmate Thomas Thompson endeavored to litigate claims of newly discovered evidence in federal court in the eleventh-hour before his scheduled execution by bringing motions for relief from judgment in the district court and to recall the mandate in his first federal habeas proceeding. The Ninth Circuit responded by recalling its mandate after this Court had denied certiorari and the matter was final. The en banc majority emphasized its recall was not based on Thompson's newly discovered evidence. Rather it was relitigating Thompson's prior habeas claims on the same facts and law. The Ninth Circuit's recall of its mandate and subsequent orders vacating its decision and granting Thompson habeas relief were in excess of its jurisdiction and a clear violation of both the spirit and letter of the law governing second or successive applications for habeas corpus relief.

A. The Ninth Circuit Lacked Jurisdiction To Consider Thompson's Habeas Corpus Claims

A federal appeals court's authority over state prisoners is limited to that granted to it by Congress. *See Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 2338, 2340 (1996); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). AEDPA was signed into law on April 24, 1996, and limits the authority of federal appeals courts to consider federal habeas

corpus relief for state inmates. The en banc majority's decision on August 3, 1997, was clearly in excess of its jurisdiction in habeas corpus proceedings as proscribed by the AEDPA.

Section 103 of AEDPA amends Fed. R. App. P. 22a to preclude a federal appeals court from entertaining an original petition for writ of habeas corpus. *Felker*, 116 S. Ct. at 2338. An application for habeas relief presented to a federal appeals court must be transferred to the appropriate district court for consideration. *Id.* at 2338, n.3. Beyond precluding original proceedings in the federal appeals court, AEDPA also "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court." *Felker*, 116 S. Ct. at 2337. That "gatekeeper" responsibility has been placed with the courts of appeals.

Pursuant to the AEDPA, before a habeas corpus petitioner can pursue a second or successive application on a new rule of constitutional law or newly discovered facts, the petitioner must establish by clear and convincing evidence that no reasonable jury could have found the defendant guilty in the absence of constitutional error. 28 U.S.C. § 2244(b)(2). AEDPA further requires that any claim already presented in a prior application must be dismissed. 28 U.S.C. § 2244(b)(1). Finally, the petitioner must file an application making a prima facie showing that he meets these requirements and receive permission from the federal court of appeals before a second petition can be filed in the district court. 28 U.S.C. § 2244(b)(3). These requirements clearly applied to Thompson's eleventh-hour efforts to have his claims of newly discovered evidence litigated in federal court.

When Thompson simultaneously filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) in the district court and his Motion to Recall the Mandate in the Ninth Circuit 13 days before his scheduled execution, the judgment on the merits of his first federal habeas proceeding was final. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6

(1987); *Calderon v. US Dist. Court for Central Dist. of Cal. (Beeler)*, 112 F.3d 386, 389 n.2 (9th Cir. 1997). Specifically, this Court denied certiorari in Thompson's first federal habeas corpus proceeding on June 2, 1997, (*Thompson v. Calderon*, 117 S. Ct. at 2426), the Ninth Circuit issued its mandate on June 11, 1997, and the mandate was formally spread in the district court on June 24, 1997. The procedural requirements of AEDPA regarding second and successive petitions, as well as the limits on the federal courts of appeals jurisdiction, became law on April 24, 1996. Accordingly, the procedural requirements of AEDPA unquestionably governed Thompson's eleventh-hour efforts to be heard in federal court, as his Motion to Recall the Mandate was filed 15 months after AEDPA became law. *See Felker*, 116 S. Ct. at 2334; *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2068 (1997).

B. A Federal Circuit Court's Power To Recall Its Mandate Does Not Relieve A State Inmate Or Federal Circuit Court From The Obligation To Comply With Requirements For Successive Habeas Petitions

In its order recalling the mandate the en banc majority relies on its "inherent power" to recall its mandate and emphasizes the sua sponte nature of its actions. (J.A. 213-15.) Legal precedent for courts of appeals recalling the mandate does not afford a court jurisdiction over habeas corpus proceedings where none otherwise exists.[4] Any "inherent power" the Ninth Circuit enjoys to recall its

4. The Brief of Amici Curiae in Support of Petitioner prepared by the Attorney General of Arizona explains in depth why a federal court should never be permitted to recall its mandate in a habeas corpus proceeding. Petitioner agrees with both the position and analysis in the amici curiae brief.

mandate in non-habeas corpus matters does not ameliorate the fact it acted in excess of its jurisdiction and in contravention of AEDPA in recalling the mandate in Thompson's case.

The law is well-established that limitations on abusive and successive requests for federal habeas corpus relief cannot be circumvented merely by reopening a final judgment. This legal principle has been applied both prior, and subsequent, to enactment of AEDPA. Habeas petitioners seeking relief in the district court after litigating a first federal petition on the merits must comply with the limitations on second or successive petitions regardless of how their request for habeas relief is formulated. *See Bonin v. Calderon*, 59 F.3d 815, 847 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 718 (1996). When inmates have filed a Fed. R. Civ. P. 60(b) motion for relief from the judgment entered on a first habeas petition, the motion is properly deemed the functional equivalent of a second or successive habeas petition. *See In re Medina*, 109 F.3d 1556 (11th Cir. 1997); *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996); *McQueen v. Scroggy*, 99 F.3d 1302, 1334 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992), *cert. denied*, 508 U.S. 916 (1993); *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993), *rev'd on other grounds*, 115 S. Ct. 1555 (1995); *Clark v. Lewis*, 1 F.3d 814, 825 (9th Cir. 1993).

As this Court has made clear, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." *McFarland v. Scott*, 512 U.S. 849, 866 (1994). No habeas corpus petitioner can invoke Rule 60(b) in an attempt to "alter the statutory command" of 28 U.S.C. § 2254. *Pitchess v. Davis*, 421 U.S. 482, 489 (1975). "[B]ecause a Rule 60(b) motion following the entry of final judgment in a habeas case raises policy concerns similar to those implicated by a second petition," it is subject to the same standard which governs whether a petitioner should be permitted to

file a second petition. *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). Nothing in law or equity counsels a different result regarding motions to recall the mandate brought by habeas corpus litigants.

At some point there must be finality. *Darden v. Wainwright*, 477 U.S. 168, 188 (1986) (Burger, C.J., conc). Federal challenges to state convictions "entail greater finality problems and special comity concerns." *Engle v. Isaac*, 456 U.S. 107, 134 (1982). To whatever extent the reexamination of state convictions in the first round of federal habeas corpus proceedings offends comity, that offense is only exacerbated when a state is called upon to defend its conviction a second time. *McCleskey v. Zant*, 499 U.S. 467, 492 (1991).

The policy concerns implicated by a habeas petitioner pursuing a Rule 60(b) motion in the district court apply equally to a habeas petitioner moving to recall a mandate in the court of appeals. *See, e.g., Ruiz* v. *Norris*, 104 F.3d 163, 164 (8th Cir. 1997). In apparent recognition of that fact, the Ninth Circuit has expressly forbidden the recall of its mandate simply to avoid the procedural bars in AEDPA. *Nevius v. Sumner*, 105 F.3d 453, 461-62 (9th Cir. 1996).

As the State specifically requested in its response to the filing of the Motion to Recall the Mandate, the Ninth Circuit should have deemed the motion a request for permission to file a second habeas petition in the district court.[5]

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5. The district court properly deemed Thompson's motion for relief from judgment filed pursuant to Fed. R. Civ. P. 60(b) to be a second habeas petition and declined to proceed based on its lack of jurisdiction due to Thompson's failure to comply with AEDPA's requirement of obtaining permission of the Ninth Circuit pursuant to § 2244(b)(3) for the filing of a second or successive habeas petition. (J.A. 169-72.)

C. Thompson's Motion For Recall Of The Mandate Was A Deliberate "End Run" Around The Procedural Requirements Of AEDPA

As Judge Hall observed in her dissenting opinion:

> Thompson's motion to recall the mandate is not — and no one should think it is — a request to recall the mandate for a genuine reason. It is, pure and simple, an attempt to skirt the AEDPA's successive petition requirements.

(J.A. 250.)

Thompson's tactical choice of filing a Rule 60(b) motion in the district court, and a motion to recall the mandate in the Ninth Circuit is predicated on the fact that he cannot satisfy the procedural requirements of AEDPA. Otherwise, he would simply have requested permission from the Ninth Circuit to file a second habeas petition.

Even if a three-judge panel of the Ninth Circuit gave Thompson permission to return to the district court, the district court must then determine if the requisite showing under AEDPA has in fact been met by Thompson. Since the district court already concluded in denying Thompson's Rule 60(b) motion that a second or successive petition from Thompson would constitute an abuse of the writ and that Thompson's execution would not be a fundamental miscarriage of justice under pre-AEDPA standards (J.A. 172-74, 188), it is clear that Thompson could not have satisfied the more stringent standards of the AEDPA in the district court. Thompson's pursuit of a Motion to Recall the Mandate was solely for the purpose of evading the procedural limitations of AEDPA.

D. Reformulating Thompson's Motion To Recall The Mandate Sua Sponte Did Not Ameliorate The "End Run" On AEDPA

Thompson's Motion to Recall the Mandate was predicated on grounds of newly discovered evidence. The three-judge panel of the Ninth Circuit denied the motion without prejudice after concluding Thompson's motion was unsupported by an adequate evidentiary record, since his "newly discovered evidence" claim had not been litigated in the district court prior to Thompson pursuing a motion to recall the mandate. Moreover, the three-judge panel correctly indicated that Thompson should litigate his "newly discovered claims" in a second habeas petition, after moving the Ninth Circuit for authorization as required by 28 U.S.C. § 2244 (b)(3)(A). (J.A. 192-93.)

The Ninth Circuit voted to consider en banc "whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice." (J.A. 194.) The dissents to rehearing en banc expressly noted the legal precedent foreclosing the use of a recall of the mandate to circumvent the procedural requirements of AEDPA. (J.A. 194.) Following the authorization of en banc rehearing, the en banc majority declined to consider Thompson's ground of newly discovered evidence, and instead sua sponte reformulated his motion as a challenge to the three-judge panel's unanimous and final decision based solely on the exact same facts and law before the court at the time of its decision. (J.A. 214.) This sua sponte reformulation of Thompson's motion is wholly inconsistent with AEDPA's limitations on successive petitions.[6]

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6. A federal appeals court has jurisdiction to rehear en banc "an appeal or other proceeding." Fed .R. App. P. 35(a). In conformity with Rule 35(a), the only en banc "rehearing" of Thompson's Motion to Recall the Mandate should have been limited to the motion brought by

The "inherent power" of the Ninth Circuit to recall its mandate, does not enable it to act in excess of its statutory jurisdiction in habeas corpus matters. *See Felker*, 116 S. Ct. at 2338, 2340. As Judge Hall observed:

> Congress has made it very clear that a petitioner may not present for a second time claims which failed in prior habeas petitions. *See* 28 U.S.C. § 2244(b)(1). If Thompson tried solely to revisit the claims rejected in his first petition, his second petition (no matter how it is cloaked) must be dismissed by the court. 28 U.S.C. § 2244(b)(3)(B)-(C). The court's denial of such an application is not appealable and may not be the subject of a petition for rehearing. 28 U.S.C. § 2244(b)(3).

(J.A. 251.)

In other words, as the "gatekeeper" the Ninth Circuit could not permit a state inmate to be heard a second time in federal court on the same claims. If the Ninth Circuit lacked jurisdiction to allow Thompson to return to the district court to relitigate the same claims on the same facts and same law, it is axiomatic that it did not have any basis for allowing such relitigation before it sua sponte or otherwise.[7]

Thompson, and denied by the three-judge panel. By sua sponte reformulating Thompson's motion to exclude his grounds, and adding its own grounds for the motion, the en banc majority proceeded to "rehear" a matter which was never really before the three-judge panel.

7. Thompson's Rule 60(b) motion for relief from judgment that he filed in the district court simultaneously with his Motion to Recall the Mandate had already been denied by the district court at the time of the en banc rehearing. Moreover, Thompson's appeal from the denial of his Rule 60(b) motion was already fully briefed at that time. Rather than considering the appeal from the district court's order denying the Rule 60(b) motion simultaneously with the en banc rehearing, since Thompson's allegations in his two motions were essentially identical, the en banc majority instead reformulated Thompson's Motion to Recall the

Further, while the en banc majority emphasized that it acted sua sponte in reviewing the panel decision in Thompson's case based solely on the absence of the en banc process in Thompson's case, as opposed to any new evidence presented by Thompson or any ground for relief he suggested in his Motion to Recall the Mandate (J.A. 214-15, n.3.), the en banc majority was nevertheless responding to Thompson's eleventh-hour motion. Otherwise, the Ninth Circuit undoubtedly would have acted before the filing of Thompson's Motion to Recall the Mandate.

Notably, the "extraordinary circumstance" underlying the en banc majority's sua sponte action, i.e. the failure of two judges to make a timely call for an en banc vote, was known to the entire court prior to the issuance of its mandate and the filing of Thompson's motion. The en banc majority cites "the interests of comity" as the reason for delaying "until the state court proceedings were concluded and Thompson sought return to federal court" before acting. (J.A. 216.) The reference to state proceedings might tend to suggest the absence of a timely call for an en banc vote was discovered by the Ninth Circuit while Thompson's fourth state habeas was pending in the California Supreme Court, i.e. between July 3, 1997, and July 16, 1997. As Judge Reinhardt asserts in his separate concurring opinion, however:

> the entire court was immediately notified of the three judge panel's unprecedented refusal to permit two judges of this court a brief extension of time to make an en banc call.

Mandate to exclude his claim of newly discovered evidence. By refusing to consider the pending appeal from the denial of Thompson's Rule 60(b) motion, the en banc majority was able to ignore the factual findings of the district court which were adverse to Thompson, and which dispel the en banc majority's suggestion that "a possibly innocent man" was about to be executed.

(J.A. 241.) He also states that the entire court was notified immediately when two other judges requested that a belated en banc vote be entertained before the mandate was spread in the district court, i.e. before June 24, 1997. (J.A. 241.) On neither occasion, however, does it appear that a majority of the Court believed further review was warranted. It was only after the filing of Thompson's Motion to Recall the Mandate that the Ninth Circuit undertook any action.

Moreover, the very nature of the "exceptional circumstance" cited by the en banc majority also suggests that Thompson's eleventh-hour newly discovered evidence claim was the actual catalyst for the en banc majority's actions. The only defect in the en banc process claimed by the en banc majority is the failure of two judges to make a timely call for an en banc vote in Thompson's case. Since all of the judges in the Ninth Circuit were privy to the panel's decision, and only two missed calling for an en banc vote, it is reasonable to infer that a timely call for an en banc vote would have yielded no more than two votes. Indeed, if more than the two judges in question had believed en banc review was appropriate they would have instigated the vote for en banc review themselves. Accordingly, the explanation for an increase in interest in en banc review from the two judges in question to the number of votes necessary for the issuance of the en banc rehearing order of July 30, 1997, apparently rests with the Ninth Circuit's exposure to Thompson's claim of newly discovered evidence.

Further, the en banc majority's actions cannot be properly deemed sua sponte in nature when the full court's vote to authorize en banc reconsideration was clearly not predicated on sua sponte action unrelated to Thompson's Motion to Recall the Mandate. The dissent to the en banc order notes that it remained unclear whether Thompson's newly discovered evidence claims would be considered. (J.A. 195.) Additionally, the parties were not informed prior to en banc oral argument that Thompson's newly discovered evidence claims would not be entertained en banc, and that

the en banc court was acting sua sponte and not in response to Thompson's Motion to Recall the Mandate. (*See* J.A. 194-95.)

Finally, even assuming arguendo that the en banc majority acted sua sponte and in fact disregarded Thompson's claims of newly discovered evidence, the circumvention of AEDPA is not ameliorated. It is clear that AEDPA precludes relitigation of the same claims on the same facts and same law. 28 U.S.C. § 2244(b)(1). Accordingly, even if the Ninth Circuit's action in recalling its mandate was truly sua sponte, its "end run" around AEDPA was in excess of its jurisdiction.

The result oriented, eleventh-hour decision of the en banc majority was in excess of its jurisdiction, contrary to law and equity, and a mockery of the judicial system. Accordingly, the judgment of the en banc majority should be reversed in its entirety.

II.

IT WAS AN ABUSE OF DISCRETION TO RECALL THE MANDATE SIMPLY BECAUSE TWO JUDGES FAILED TO REQUEST A VOTE FOR REHEARING EN BANC IN A TIMELY MANNER

The en banc majority of the Ninth Circuit clearly abused its discretion in finding that the failure of two judges to make a timely request to rehear Thompson's case en banc constituted an "exceptional circumstance" justifying the recall of its mandate. A final judgment cannot be disturbed simply because two judges failed to make a timely call for an en banc rehearing vote. The absence of a vote for en banc review, or absence of en banc review itself, does not constitute "exceptional circumstances" justifying the recall of a mandate.

The en banc majority observes that its power to recall the mandate is a "means of protecting the integrity of its processes and decisions." (J.A. 216, citing *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674 (9th Cir. 1973).) Reopening a final judgment in the eleventh hour in a capital case simply because the en banc majority would have decided the case differently has absolutely nothing to do with upholding the integrity of the judicial process. Beyond violating AEDPA, the en banc majority has also acted contrary to the doctrine of law of the case in recalling its mandate.[8/]

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8. While the doctrine of law of the case provides finality in judicial decision, traditional application of the law of the case to habeas corpus proceedings is inadequate to address the heightened concerns over finality in habeas corpus matters. Accordingly, the en banc majority's departure from principles of law of the case demonstrates an egregious abuse of discretion in Thompson's case.

"The doctrine of law of the case 'expressed the practice of courts generally, to refuse to reopen what has been decided.'" *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). The rule is that

> once a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional circumstances, in the disposition of the lawsuit.

Schwartz v. NMS Industries, Inc., 575 F.2d 553, 554 (5th Cir. 1978).

> The doctrine rests upon the important public policy that '[n]o litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time.'

Gindes v. United States, 740 F.2d 947, 949 (Fed. Cir. 1984). The Ninth Circuit has clearly recognized concerns about the coherence and stability of the application of the doctrine of law of the case when a three-judge panel departs from prior decisions in a case. *See Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997).[9/] Moreover, the Ninth Circuit has observed that the manner in which panels apply the law of the case doctrine is an important consideration to an en banc court. *Id.* There is no reason in logic or law that concerns about coherence and stability would not also guide the application of the doctrine of law of the case when the Ninth Circuit is sitting en banc. The policies underlying the doctrine of the law of the case, and the impact on the litigants and society from departure from the doctrine, remain the same whether the actions are by a panel or en banc.

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9. A Petition for Writ of Certiorari is presently pending before this Court in *Wood v. Jeffries*, No. 97-289.

> [A]s a matter of sound judicial practice, a court generally adheres to a decision in a prior appeal in the same case unless one of three 'exceptional circumstances' exists: 'the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'[10]

Gindes, 740 F.2d at 950, quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967).

An untimely request for a vote regarding en banc review by two judges of an appellate court does not remotely approach any of the three "exceptional circumstances" which permit a court to deviate from the law of the case. Absent a showing of "exceptional circumstances" justifying departure from the law of the case, a recall of the mandate is an abuse of discretion, even in a non-habeas corpus case.

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10. These "exceptional circumstances" justifying a departure from the law of the case illustrate precisely why a determination to relitigate habeas corpus claims cannot properly be resolved under traditional principles of the doctrine of the law of the case. For example, a contrary decision of law applicable to issues in the case cannot be the basis for habeas corpus relief unless it involves a new constitutional rule of law that is retroactive on collateral review. *Teague v. Lane*, 489 U.S. 288, 308-10 (1989). Further, while law of the case includes exceptions based on clearly erroneous decisions resulting in a manifest injustice, a miscarriage of justice permitting relitigation of Thompson's claims has been specifically defined by this Court, and requires a showing of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 316, 326-27 (1995). Given these critical distinctions between the procedural requirements governing second and successive requests for habeas relief and the exceptions to the doctrine of the law of the case, the en banc majority erred in recalling its mandate based on traditional exceptions to the doctrine of the law of the case.

A. Any Internal Confusion Within The Ninth Circuit Regarding Procedures For Requesting A Vote For En Banc Rehearing In Thompson's Case Does Not Constitute "Exceptional Circumstances" Justifying Revisiting A Final Judgment Of A Federal Court

The majority's assertion that the en banc process did not function in the "intended manner" cannot constitute good cause for the recall of the mandate for several reasons. First, as Judge Kozinski noted, neither the parties, nor this Court are privy to the internal process which occurred in this case regarding the suggestion for en banc review. Accordingly, absent Judge Kozinski's dissenting opinion, the factual component of the internal process in this case which led to the recall of the mandate would not be subject to dispute or review.

As Judge Kozinski explains, an off-panel judge made a request for a General Order 5.4(b) notice on September 27, 1996, which is the process for notifying the full court of a panel's actions and establishes the time by which a call for an en banc vote must be made. (J.A. 256-57.) In response to that request, the three-judge panel properly issued the 5.4(b) notice on January 17, 1997. The panel stated its intention to make minor changes to its decision, and to otherwise deny Thompson's Petition for Rehearing. The members of the Ninth Circuit, pursuant to its General Orders, had 14 days from the issuance of the January 17, 1997, notice to call for an en banc vote. Absent such a request, the suggestion for rehearing en banc is properly deemed rejected. No en banc call was made on or before January 31, 1997. Over a month later, on March 6, 1997, the panel filed a revised opinion, as indicated in its 5.4(b) notice. On March 12, 1997, another off-panel judge requested the panel withdraw its modified opinion in order to give that judge an opportunity to call for an en banc vote. On March, 13, 1997, the off-panel judge who had requested the issuance of the 5.4(b) notice in the case seconded the

request for the withdrawal of the modified opinion. Four days later, that same judge inquired whether the 5.4(b) notice had circulated in the case. The judge was informed that the 5.4(b) notice had issued on January 17, 1997, and that the mandate in the matter had been stayed pending consideration of a petition of certiorari by this Court. (J.A. 257-58.)

At this juncture, the two off-panel judges had every opportunity to pursue the matter before the case became final. Despite the time limits in the Ninth Circuit's General Orders for the making of an en banc call, any judge of the Ninth Circuit could have made an en banc call in March of 1997, and compelled the en banc coordinator to determine if the request was timely, or whether to waive time limits based on excusable neglect. Even if the en banc coordinator declined to permit the en banc call, any judge of the Ninth Circuit could have asked to have the internal rules suspended pursuant to General Order 11.11. (J.A. 261.) No judge did so, just as no judge requested an en banc vote within the applicable time limits.

It has never been suggested that either of the two judges did not receive the timely 5.4(b) notice. Indeed, as recounted by Judge Kozinski, an off-panel judge stated the problem was with the malfunctioning of that particular judge's chamber system and "'the opinion simply fell between the cracks.'" (J.A. 257.) The judge's

> 'partial explanation, but not excuse, is that the disposition was circulated shortly before a law clerk transition and the old and new law clerks assigned to the case failed to communicate.'

(J.A. 257-58.)

Notably, instead of pursuing relief in conformity with its internal procedures, the two judges did nothing about a purported compromise of the court's process until after this Court had denied certiorari, despite the fact the mandate

remained stayed from March of 1997 until this Court's denial of certiorari in June of 1997.[11/]

Second, as Judge Kozinski observed, the failure of two judges to request an en banc vote does not constitute "extraordinary circumstances." This is particularly true considering the fact that the procedures in question "are the procedures applicable to all cases and every one of our judges is familiar with them; we use them every day." (J.A. 256.)

The Ninth Circuit cannot use its power to recall the mandate "'simply as a device for granting late rehearing.'" *Moran v. McDaniel*, 80 F.3d 1261, 1267 (9th Cir. 1996), quoting *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986). The en banc majority attempts to depart from this rule of law by suggesting that the failure to make a timely call for en banc review "in a capital case involving serious constitutional issues is in itself exceptional in our court." (J.A. 216.) The fact that a case involves a sentence of death affords no basis for departing from legal procedures or precedent, or justification for en banc review in the first place.[12/]

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11. Remarkably, the en banc majority notes that it considered making a sua sponte request to consider en banc whether to recall the mandate even before the mandate was spread in the district court, but "through a consultative process, the court decided to postpone action on whether sua sponte to recall the mandate until after Thompson concluded his state court habeas proceedings and filed a further request for review" with the Ninth Circuit. (J.A. 215.) The decision by the Ninth Circuit to delay action is indistinguishable from the conduct of litigants engaging in eleventh-hour manipulations, and should receive the same response from this Court. *See Herrera v. Collins*, 506 U.S. 390, 425-26 (1993).

12. Condemned inmates routinely make allegations of "serious constitutional issues" in habeas corpus petitions. Accordingly, if it is "exceptional" in the Ninth Circuit when a vote for en banc rehearing is not requested by a member of the Ninth Circuit in a capital case "involving 'serious constitutional issues,'" the reality is that it is the practice of the Ninth Circuit to subject all cases involving imposition of

B. A Criminal Defendant Has No Right To En Banc Review By A Federal Appeals Court

The failure of two judges of an intermediate appellate court to request en banc rehearing in a capital case in a timely manner did not constitute a proper basis for revisiting a final decision in this capital case less than 36 hours before a scheduled execution. A final determination had been made, in accordance with all laws and procedures, that Thompson received a fair trial, and no finding of "exceptional circumstances" can reasonably be predicated on the absence of en banc rehearing in his case.

The en banc panel erroneously equates en banc rehearing with Thompson "receiving full and fair consideration of his claims. . ." (J.A. 217.) After eight years of litigation in the federal court, including a denial of certiorari by this Court, Thompson had already received full and fair consideration of his claims. Beyond ignoring the years of judicial resources consumed in reviewing Thompson's claims in the federal courts, the en banc majority also ignores the limited nature of habeas corpus review. This was not Thompson's direct appeal, as that concluded almost a decade ago, when this Court denied Thompson's first Petition for Writ of Certiorari. *Thompson v. California*, 488 U.S. at 960.

This Court has made it clear that federal habeas proceedings are "secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Given that limited nature, it is incongruous to suggest that en banc rehearing

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the death penalty to a vote for en banc rehearing. That practice cannot be justified in light of the standards for granting en banc rehearing. There is no justification for subjecting states within the Ninth Circuit to en banc scrutiny by a federal circuit court in every capital case. An en banc court is the exception and not the rule. *U.S. v. American-Foreign S.S. Corp*, 363 U.S. 685 (1960); *See* 28 U.S.C. § 46. The fact that a death sentence has been imposed in a case affords no justification for applying a different standard regarding en banc rehearing.

was essential to Thompson, or any other habeas litigant, receiving "full and fair consideration" of habeas claims. As Judge Kozinski concluded:

> It has long been established that '[tlhe function of en banc hearings is not to review alleged errors for the benefit of losing litigants,' *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (en banc), citing *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 256-59 (1953). En banc review, rather, is a means for a multi-judge court that sits in panels of less than the entire number to bring consistency within its law. *See Western Pacific R.R.*, 345 U.S. at 260 n.20. Thus, the majority commits egregious error when it suggests that en banc review is 'a part of the full and fair procedure our court affords in connection with initial habeas petitions.' [J.A. 216.] A cursory review of the most elemental authorities on this point discloses this is just not so. The statute which grants power to the court to sit en banc gives the parties no rights whatsoever to require en banc rehearing, or even a consideration by the full court of the suggestion. *See, e.g., Western Pacific R.R.*, passim; Notes of Advisory Committee on Appellate Rules following Fed. R. App. P. 35 ('The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court.').

(J.A. 262.)

It is clear that the absence of an en banc rehearing vote is not an "exceptional circumstance" in this case since

Thompson's case did not present a basis for granting en banc review, even if requested in a timely manner. Nothing in the three-judge panel's unanimous decision presented a need to resolve conflicting authority present in the case, or any question of exceptional importance, as evidenced by the absence of a timely request for an en banc vote by any circuit judge. *See* Fed. R. App. P. Rule 35; Cir. R. 35-1.

Further, a breakdown in the en banc process within the Ninth Circuit does not constitute "extraordinary circumstances" justifying recall of a mandate. If a legal issue worthy of en banc consideration was present in the case, it necessarily would reoccur, as that is the very definition of an issue worthy of en banc review. As Judge Kozinski observed:

> [a]ny problem worthy of en banc consideration will perforce appear again and again; missing an en banc call in a single case does not terminate forever the opportunity of judges troubled by the error to raise the issue.

(J.A. 263.)

Notably, if a litigant deliberately waited until this Court had acted on a pending petition for writ of certiorari, before seeking relief from a default in the Ninth Circuit, he would no doubt be precluded from relief having elected to gamble on the outcome of the proceeding instead of making a timely request for relief. In this case, the Ninth Circuit waited until: (1) this Court denied certiorari; (2) the California Supreme Court denied habeas relief; (3) the district court denied Thompson's Rule 60(b) motion; and (4) the three-judge panel denied the Motion to Recall the Mandate before undertaking any action. That manipulation of the judicial process should foreclose application of any equitable principle as a means of undoing the three-judge panel's decision and effectively mooting all the subsequent litigation in state and federal courts in this case.

The neglect of two judges should not be used "to reverse the system of justice that has proceeded as a result of, and in reliance on, [the Ninth Circuit's] final judgment" in Thompson's case. (J.A. 253.) Thompson's guilt and punishment have been exhaustively litigated in the state and federal courts for approximately 16 years. He has been heard by the California Supreme Court no less than five times. Thompson amended his federal habeas petition three times, and the federal courts heard his habeas claims for no less than eight years. Under these circumstances the only manifest injustice occurred when the en banc majority permitted the mandate to be withdrawn.

III.

THE EN BANC MAJORITY ERRED IN FINDING A MANIFEST INJUSTICE OR FUNDAMENTAL ERRORS OF LAW IN THE THREE-JUDGE PANEL'S DECISION

There were no "fundamental errors of law" resulting in a "manifest injustice" in the three-judge panel's decision in Thompson's habeas corpus proceeding. Accordingly, beyond the lack of jurisdiction under AEDPA, there was no justification for the recall of the mandate even under non-habeas standards.

A. The Eleventh-Hour Nature Of The En Banc Majority's Opinion Belies Any Suggestion Of Certainty That The Unanimous Three-Judge Panel's Decision Was Fundamentally Wrong As A Matter Of Law Resulting In A Manifest Injustice

As a matter of sound judicial practice, a court generally adheres to a decision in a prior appeal in the same case unless "exceptional circumstances" exist. The second "exceptional circumstance" cited by the en banc majority is "fundamental errors of law that would result in a manifest injustice." (J.A. 212.) The standard of proof for a manifest injustice "is a stringent one." *Northern Helex Co. v. United States*, 634 F.2d 557, 562 (1980). Accordingly, under principles of law of the case, the en banc panel must have been "convinced to a certainty" that the unanimous three-judge panel's decision was incorrect before reexamining the decision. *Northern Helex*, 634 F.2d at 950. The eleventh-hour nature of the en banc majority's decision belies any suggestion of certainty.

The three-judge panel that denied Thompson's Motion to Recall the Mandate consisted of the same judges who

rendered the decision in the underlying appeal. Accordingly, the three-judge panel considering the Motion to Recall the Mandate had knowledge of both the issues in the case, as well as the extensive record on appeal, having rendered a thorough and well reasoned decision which was the product of months of reflection following briefing and argument by the parties.

As Judge Kleinfeld candidly acknowledged in his dissenting opinion:

> I write with some trepidation, because the last-minute aspect of this proceeding prevents me from mastering the record. Though death penalty cases are typically litigated for more than a decade, as this one has been, we are always presented with critical decisions to make in a procedural context that prevents us from knowing the record as well as in routine cases. For this reason, Congress and the Supreme Court have rightly seen last-minuteness as an obstacle to truth and justice.

(J.A. 268.)

The rush to undo what a three-judge panel had done after months of due consideration in the ordinary course belies any suggestion of the "certainty" of error required under the doctrine of law of the case before reexamining a prior judicial decision.

Moreover, the en banc majority's opinion expressly states a far lesser certainty than is required to recall a mandate in a non-habeas case.

The en banc majority concluded that

> [w]hen we examine the totality of the circumstances (both substantive and procedural), the grave questions that exist regarding Thompson's innocence of any capital offense, the likelihood that the panel's decision is erroneous, and the consequences that would flow from allowing an erroneous decision to go unreviewed,

> we are persuaded that the circumstances involved are extraordinary.

(J.A. 218-19.) The "likelihood" an opinion is "erroneous" is a grossly inadequate justification for reversing a capital case in the eleventh-hour. This is particularly true when the claims of fundamental error involve virtually every facet of the state court trial in a case that has been repeatedly reviewed by both state and federal courts. The en banc majority's conclusion that

> the jury was wrong, the prosecutor was unethical, the defense lawyer was incompetent, the trial judge failed to protect Thompson from all this, and the three judge panel of this court was blind to the injustice of it all

(J.A. 268), is simply untenable.

The uncertainty underlying the en banc majority's action also undermines the state court trial as the "main event." *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

> A jury which, unlike the members of [the Ninth Circuit], heard and saw the testimony and other evidence, concluded that Thompson raped and murdered Ginger Fleischli, and that he should be executed for it.

(J.A. 268.) The en banc majority had no basis for substituting its judgment for that of the jury, the state courts and the federal courts that had affirmed Thompson's conviction and sentence and death.

No manifest injustice occurred in this case prior to the en banc action. Disagreement among jurists as to how to apply the law to the facts of a case is clearly not indicative of a manifest injustice.

As Judge Kozinski aptly noted:

> While the majority now comes to a different conclusion than the three-judge panel, it does not

> indicate where the panel opinion was in conflict with the law of the circuit, the law of another circuit or the Supreme Court. In fact, the difference between the earlier opinion and this one involves only the application of law to facts, quintessentially the kind of case where en banc review is routinely rejected. Nor is this a case of transcending importance, unless one views every death case as exceptional.

(J.A. 260.)

In an effort to justify its assertion of "fundamental errors of law," the opinion of the Ninth Circuit en banc majority discusses matters more appropriately addressed in a clemency decision, than by a court in the eleventh-hour before an execution. (J.A. 218-19.) It was not the province of the en banc majority to substitute its judgment for that of the California jury, the highest court in California, or for that matter the unanimous three-judge panel. The integrity of the judicial process is not preserved by the ill-informed, result-oriented justice that is represented by the en banc majority's actions in this case.

1. The Finding Of No Prejudice From The Alleged Deficiencies Of Trial Counsel Was Not A Fundamental Error Of Law

The en banc majority disagrees with the unanimous three-judge panel's determination that Thompson was not prejudiced by any of defense counsel's alleged deficiencies in rebutting the forensic evidence of rape. (J.A. 224.) Aptly illustrating why truth and justice are not served by eleventh-hour manipulations within the federal judicial system, the en banc majority condemns Thompson's defense trial counsel based on a totally false version of his defense theory.

The en banc majority concludes defense counsel's theory was that Thompson's crime partner, David Leitch raped Fleischli. (J.A. 223.) It was never suggested anywhere in

16 years of state and federal litigation, nor does the record support, the en banc majority's statement that defense trial counsel endeavored to prove that David Leitch raped Ginger Fleischli. The defense theory was that there was no rape, because Thompson's sexual encounter with the victim was consensual, and she was subsequently murdered by someone else, most probably David Leitch. This enormous distinction completely eluded the en banc majority.

With misdirected hindsight, the en banc majority faulted defense trial counsel for not removing the basis for special circumstances and the death penalty, i.e. the rape. (J.A. 223.) This ignores the fact that his death sentence and the underlying rape special circumstance rests with Thompson's own damning testimony and the compelling evidence which remained unrefuted by Thompson after the habeas proceedings in the district court. Defense counsel's representation was necessarily affected by Thompson's insistence on a defense based on consensual intercourse just prior to the victim being brutally stabbed to death about six feet from where Thompson claims to have slept through the murder.

The en banc majority surmises that if the prosecution's pathologist had been impeached, the prosecution would have been left with nothing more than semen consistent with Thompson's blood type in support of its rape allegations. (J.A. 224.) This distorted and myopic view of the evidence cannot withstand the slightest scrutiny.[13/]

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13. The en banc majority accepted as true the testimony of pathologist Irving Root despite the fact the State was inexplicably and erroneously denied the right to cross-examine Dr. Root regarding his bias, credibility, and competence. The three-judge panel did not reach such issues since the appeal was resolved on the issue of prejudice. (J.A. 149, n.4.) The en banc majority could not properly have revisited the merits of Thompson's ineffective assistance of counsel claim without also addressing this facet of the State's cross-appeal. The en banc majority never acknowledged, let alone explained, its reliance on testimony untested by cross-examination due to a clearly erroneous ruling by the district court.

The condition of Fleischli's body provided compelling evidence that she was raped. As the unanimous three-judge panel correctly noted:

> The State presented a strong rape case during the state trial. It demonstrated the existence of semen consistent with Thompson's. On the question of consent, the condition of the body provided compelling evidence of rape. Someone had cut Fleischli's shirt and bra up the middle and pulled them down to her elbows, placing her in a position consistent with restraint during a rape. Thompson suggested at trial that someone could have done this after killing her in order to facilitate moving her body, but the body was otherwise secured by the blanket, tape and ties. No logical inference supported exposing her breasts and restraining her in this fashion merely in order to move her dead body. Fleischli wore no shoes, socks or underwear, and her jeans had been fully zipped but not buttoned. She also suffered a severe crushing injury to her right wrist at or near the time of her death.

(J.A. 145-46.)

The en banc majority unpersuasively suggests that the evidence that her blouse and bra had been cut up the middle and pulled down to her elbows, exposing her breasts, "more likely suggests that the restraint was connected to the murder than that it evidenced a rape." (J.A. 224, n.6.) The reason the en banc majority equates the exposure of the victim's breasts with murder, as opposed to rape, is because she was found with her jeans on, zipped and belted. (J.A. 225, n.6.) The apparent logic is that the victim was not raped and then murdered because no rapist would pull up his victim's pants,

then zip and secure the belt on those pants before disposing of the body. The en banc majority's speculation ignores the fact it would be easier to roll the victim up in a sleeping bag and dispose of the body if her jeans were pulled back up.

Since Thompson had handcuffs, duct tape and rope at the time he murdered Fleischli, he hardly needed to cut away her clothing and expose her breasts in order to restrain her for purposes of stabbing her to death. Remarkably, the en banc majority is oblivious to the obvious sexual nature of a woman's breasts being exposed by forcibly removing her clothing during an attack.

The en banc majority's view of the evidence in Thompson's case in no way demonstrates that the contrary view of the three-judge panel was even "clearly erroneous," let alone a fundamental error. The three-judge panel's unanimous decision is supported by the evidence and common sense. It is simply impossible to equate a decision that is solidly grounded in fact and common sense as being fundamentally wrong as a matter of law.

While Thompson has ensured that Ginger Fleischli is no longer alive to voice her lack of consent, the physical evidence speaks for her. Despite the passage of 16 years, Thompson's guilt of rape and murder remains obvious to anyone who cares to consider the evidence fairly, objectively, and in a common sense fashion.

The en banc majority also ignores the damning nature of Thompson's own testimony. As the unanimous three-judge panel correctly observed:

> Most importantly, Thompson's own testimony did severe damage to his defense. [n.] After having lied to police, Thompson admitted having intercourse with Fleischli that night in the apartment, and the jury did not have to believe Thompson's testimony about being sound asleep while Leitch bound, gagged and killed the victim, all a few feet away. After the trial, the state court judge revealed the impact of Thompson's fantastic

> claims when he took pains to indicate on the record [defense trial counsel's] disagreement with Thompson's decision to testify. The trial judge stated that he wanted to leave 'no one believing that defense counsel joined in the *folly* of his client testifying in my observation.' (Emphasis added). The district court agreed with this assessment of Thompson's testimony, stating that it was 'devastating to his defense.' The district court found it 'riddled with inconsistencies and outright falsehoods,' and concluded that it 'no doubt affected the jury's verdict.'
>
> Having reviewed the testimony, we would go further. As in *Williams v. Calderon*, 52 F.2d at 1470, we may here eschew an inquiry into [defense trial counsel's] assistance in favor of a clear determination that Thompson has not shown prejudice, because his own words rank among the most damaging of the testimony presented to the jury. The district court concluded that [defense trial counsel] should have worked harder to rebut other evidence of rape and the testimony of the informants, but this would not have rebutted the condition and position of the bra and shirt on the body, the presence of some bruising and Thompson's reluctant admission. After reviewing the opportunities that Thompson claims [defense trial counsel] missed, we cannot conclude that they would have made a difference in the verdict.

(J.A. 146-47.)

It is only by ignoring the evidence against Thompson that the en banc majority can suggest any concern regarding the decision of the three-judge panel in this case. The jury understandably refused to believe Thompson when he claimed consent, and the physical condition of the victim's body clearly indicates a lack of consent on her part. Under

these circumstances, the en banc majority had no justification in law or equity for intervening and undoing 16 years of state and federal litigation less than 36 hours before a scheduled execution. Such actions only foster contempt and disrespect for the judicial process.

2. The Three-Judge Panel's Decision That Thompson Was Not Denied Due Process Of Law Based On Inconsistent Prosecutorial Theories In The Separate Trials Of Thompson And His Crime Partner Was Not A Fundamental Error Of Law

The en banc majority purports to reverse Thompson's rape conviction and rape special circumstance on an alternative ground to ineffective assistance of counsel, i.e. prosecutorial misconduct based on inconsistent theories in the separate trials of Thompson and his crime partner, David Leitch. The first shortcoming to the en banc majority's ruling is the absence of an en banc majority supporting the conclusion that the prosecutor abridged Thompson's due process rights based on inconsistent theories of prosecution. Two of the seven en banc majority judges did not join in the finding of prejudice based on the prosecution's theories in the trials of Thompson and his crime partner. (J.A. 248-49.)

In any event, it cannot be deemed a manifest injustice for the unanimous three-judge panel to deny habeas relief based on Thompson's claim of inconsistent theories. This Court has already concluded that there is no manifest injustice in denying habeas relief where a state court decision violates a subsequently developed rule of criminal procedure. *Teague v. Lane*, 489 U.S. at 310. Even if meritorious, Thompson's inconsistent theories claim would constitute the development of a new constitutional rule of criminal procedure which would not be subject to retroactive application on collateral review. *Id.* If operation of *Teague* to preclude relief based on Thompson's claim would not be

a manifest injustice, it is then clear that denial of Thompson's claims on the merits by the three-judge panel could not conceivably rise to the level of a manifest injustice.

Moreover, the en banc criticism of the trial prosecutor is unsupported factually or legally. Not one of the many jurists who have considered Thompson's complaint of inconsistent theories has ever found any merit to the argument until the en banc reconsideration in the eleventh-hour of this case. Resolution of Thompson's inconsistent theories claim necessitates review of the entire trial record from two separate trials, that of Thompson and his crime partner, David Leitch. It is inconceivable that the en banc majority was in a better position to pass on this factbound issue in the eleventh-hour than the numerous state and federal judges who have considered the claim with due deliberation, and with the requisite familiarity with the voluminous records from both trials.[14]

In both Thompson's and Leitch's cases, the overriding theory was that Thompson was the murderer and that Leitch assisted in concealing the crime. The verdicts in both cases are consistent with this theory. Thompson was convicted of first degree murder and rape and the jury found true the special circumstance of murder committed during the commission of rape. Leitch, on the other hand, was convicted of second degree murder and acquitted of rape.

While the prosecutor went into more detail at Leitch's trial about his involvement and argued the extent of his

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14. While the en banc majority noted the extensive time Thompson's claims were pending before Judge Gadbois in the district court as implied support for the correctness of his partial grant of habeas relief (J.A. 217), no similar deference was paid to Judge Gadbois' consideration and rejection of the inconsistent theories claim. Moreover, the en banc majority consistently ignored the extensive expenditure of time and judicial resources by the unanimous three-judge panel in the case. Instead, the en banc majority totally disregards its limited ability to consider the state court record before reversing a capital case after 16 years of litigation in state and federal courts.

involvement, there was no impropriety or anything sinister, as it was Leitch who was on trial, not Thompson. Due process is not implicated, let alone offended, when a prosecutor, in the separate trials of crime partners, argues from the evidence presented in the particular trial.

At Thompson's trial, the defense presented evidence that Leitch was the killer and that Thompson was not involved in the murder. The prosecutor refuted this evidence and argued the jury should find that Thompson was the actual killer. At Leitch's trial, the defense presented evidence that Leitch was only an accessory after the fact, with Thompson being responsible for the murder. The prosecution's theory was that Thompson was the actual killer, but that Leitch was at least equally culpable as an aider and abettor. No violation of due process flows from the arguments in the separate trials of Thompson and Leitch. *See Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994), *cert. denied*, 513 U.S. 1070 (1995); *Jacobs v. Scott*, ___ U.S. ___, 115 S. Ct. 711 (1995).

The erroneous conclusions of the en banc majority rest with its confusion of the motives of criminals with the prosecution's theory of a crime presented in separate trials. Multiple defendants can commit crimes in concert without sharing the same motivations for their actions. A single defendant can have multiple motivations for criminal conduct, and crime partners may not share all or any motivations for a given criminal venture. Differences in motivations of criminals does not, however, serve as a basis for finding prosecutorial misconduct based on inconsistent theories of criminal liability.

The trial prosecutor fulfilled his duty as a public prosecutor in the separate trials of Thompson and his crime partner. His actions did not violate any procedure or rule of law, let alone abridge Thompson's due process rights. "There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction. . ." *Gray v. Mississippi*, 481 U.S. 648, 671 (1987) (Powell, J., conc. op). The trial prosecutor acted in

conformity with that right and duty, and did not offend Thompson's due process rights. Any other conclusion ignores the realities of prosecuting multiple defendants in separate trials.

> The majority rightly says that the prosecutor must seek above all to justice, but seems confused about what justice is. The duty to do justice in no way conflicted with the duty to seek Thompson's conviction, because there is absolutely nothing in the record to suggest the prosecutor knew or thought that Thompson was innocent.

(J.A. 274.)

Moreover, as Judge Kleinfeld aptly observed in his dissent:

> [T]here is no persuasive reason to doubt that Thompson had a fair trial, and that the jury had good reason to conclude that he raped and killed Ginger Fleischli. I am unable to share the majority's contempt for all the participants in that trial except Thompson.

(J.A. 269.)

The en banc majority had no right in law or equity to disturb the thorough and well reasoned decision of the unanimous three-judge panel. Beyond conflicting with controlling principles of law governing habeas corpus, the en banc majority's recall of the mandate was impermissibly predicated on nothing more than mere disagreement among jurists as to the disposition of a particular case. The Ninth Circuit majority's action should be reversed.

CONCLUSION

For the forgoing reasons, Warden Calderon respectfully requests the decision of the en banc majority of the Ninth Circuit be reversed in its entirety, and the decision of the three-judge panel denying Thompson's Motion to Recall the Mandate be affirmed.

Dated: September 17 1997.

Respectfully submitted,

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Attorney:	No. 97-215 October Term, 1997
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I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated courier service originated, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

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Each envelope was then sealed and with the fees prepaid deposited in the internal collection system at this Office of the Attorney General, for deposit in the ordinary course of business with the commercial courier service United Parcel Service (UPS) on the seventeenth day of September, 1997, for delivery on the following day.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 17, 1997.

STEPHEN MCGEE

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On 9/17/97 (DATE) before me, Christine J. Kaul, Notary Public (NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC").

personally appeared, Stephen McGee

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

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Christine Kaul (SEAL)

NOTARY PUBLIC SIGNATURE

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DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	**ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** Petitioner, v. **THOMAS M. THOMPSON,** Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

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On 9/17/97 (DATE) before me Christine J. Kaul, Notary Public. (NAME, TITLE OF OFFICER E.G. "JANE DOE, NOTARY PUBLIC")

personally appeared. Stephen McGee

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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WITNESS my hand and official seal.

Christine Kaul (SEAL)
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